

**FILED**

**DEC 15 2005**

CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GERALD SPENCE,

Plaintiff,

No. CIV S-03-2442 LKK DAD P

vs.

M.D. McDONALD, et al.,

Defendants.

ORDER AND ORDER DIRECTING SERVICE

BY THE UNITED STATES MARSHAL

WITHOUT PREPAYMENT OF COSTS

Plaintiff is proceeding in forma pauperis pursuant to 28 U.S.C. § 1915. On March 24, 2004, the court determined that plaintiff's complaint states cognizable claims for relief against defendant J. Kelly. Pursuant to orders filed April 20, 2004, and July 26, 2004, the United States Marshal was directed to serve process on defendant Kelly. The Marshal returned service unexecuted twice due to the fact that two correctional officers named J. Kelly are employed at High Desert State Prison. Plaintiff has provided a new USM-285 form that includes the defendant's badge number and identification number. Plaintiff has submitted the required papers for service on Justin Kelly. Accordingly, IT IS HEREBY ORDERED that:

1. The Clerk of the Court is directed to forward the instructions for service of process, one completed summons, two copies of the complaint, and copies of this order to the United States Marshal.

1           2. Within ten days from the date of this order, the United States Marshal is  
2 directed to notify defendant **Justin Kelly, Badge No. 59009, Identification No. 276176**, of the  
3 commencement of this action and to request a waiver of service of summons in accordance with  
4 the provisions of Fed. R. Civ. P. 4(d) and 28 U.S.C. § 566(c).

5           3. The United States Marshal is directed to retain the sealed summons and one  
6 copy of the complaint in their file for future use.

7           4. The United States Marshal shall file any returned waivers of service of  
8 summons as well as any requests for waiver that are returned as undelivered as soon as they are  
9 received.

10          5. If a waiver of service of summons is not returned by the defendant within sixty  
11 days from the date of mailing the request for waiver, the United States Marshal shall:

12           a. Personally serve process and a copy of this order upon the defendant  
13 pursuant to Rule 4 of the Federal Rules of Civil Procedure and 28 U.S.C.  
14 § 566(c) and shall command all necessary assistance from the California  
15 Department of Corrections ("CDC") to execute this order. The United  
16 States Marshal shall maintain the confidentiality of all information  
17 provided by the CDC pursuant to this order.

18           b. Within ten days after personal service is effected, the United States  
19 Marshal shall file the return of service for the defendant, along with  
20 evidence of all attempts to secure a waiver of service of summons and of  
21 the costs subsequently incurred in effecting service on said defendant.  
22 Costs shall be enumerated on the USM-285 form and shall include the  
23 costs incurred by the Marshal's office for photocopying additional copies  
24 of the summons and complaint and for preparing new USM-285 forms, if  
25 required. Costs of service will be taxed against the personally served  
26 defendant in accordance with the provisions of Fed. R. Civ. P. 4(d)(2).

1           6. Defendant shall reply to the complaint within the time provided by the  
2 applicable provisions of Fed. R. Civ. P. 12(a).

3           7. Unless otherwise ordered, all motions to dismiss, motions for summary  
4 judgment, motions concerning discovery, motions pursuant to Rules 7, 11, 12, 15, 41, 55, 56, 59  
5 and 60 of the Federal Rules of Civil Procedure, and motions pursuant to Local Rule 11-110 shall  
6 be briefed pursuant to Local Rule 78-230(m). Failure to oppose such a motion timely may be  
7 deemed a waiver of opposition to the motion. Opposition to all other motions need be filed only  
8 as directed by the court.

9           8. If plaintiff is released from prison at any time during the pendency of this case,  
10 any party may request application of other provisions of Local Rule 78-230 in lieu of Local Rule  
11 78-230(m). In the absence of a court order granting such a request, the provisions of Local Rule  
12 78-230(m) will govern all motions described in #7 above regardless of plaintiff's custodial status.  
13 See Local Rule 1-102(d).

14           9. Pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003),  
15 plaintiff is advised of the following requirements for opposing a motion to dismiss for failure to  
16 exhaust administrative remedies made by defendant pursuant to non-enumerated Rule 12(b) of  
17 the Federal Rules of Civil Procedure. Such a motion is a request for dismissal of unexhausted  
18 claims without prejudice. The defendant may submit affidavits or declarations under penalty of  
19 perjury and admissible documentation to support the motion to dismiss. To oppose the motion,  
20 plaintiff may likewise file declarations under penalty of perjury and admissible documentation.  
21 Plaintiff may rely upon statements made under the penalty of perjury in the complaint if the  
22 complaint shows that plaintiff has personal knowledge of the matters stated and plaintiff calls to  
23 the court's attention those parts of the complaint upon which plaintiff relies. Plaintiff may serve  
24 and file one or more affidavits or declarations by other persons who have personal knowledge of  
25 relevant matters. Plaintiff may also rely upon written records, but plaintiff must prove that the  
26 records are what plaintiff claims they are. If plaintiff fails to contradict defendant's evidence

1 with admissible evidence, the court may rely on the defendant's evidence. In the event both sides  
2 submit matters outside the pleadings, the court may look beyond the pleadings and decide  
3 disputed issues of fact. If plaintiff does not serve and file a written opposition to the motion, the  
4 court may consider the failure to act as a waiver of opposition to the defendant's motion. If the  
5 defendant's motion to dismiss, whether opposed or unopposed, is granted, plaintiff's  
6 unexhausted claims will be dismissed without prejudice.

7           10. Pursuant to Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc),  
8 and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988), plaintiff is advised of the following  
9 requirements for opposing a motion for summary judgment made by defendants pursuant to Rule  
10 56 of the Federal Rules of Civil Procedure. Such a motion is a request for an order for judgment  
11 in favor of defendants without trial. A defendant's motion for summary judgment will set forth  
12 the facts that the defendants contend are not reasonably subject to dispute and that entitle the  
13 defendants to judgment. To oppose a motion for summary judgment, plaintiff must show proof  
14 of his or her claims. Plaintiff may do this in one or more of the following ways. Plaintiff may  
15 rely upon statements made under the penalty of perjury in the complaint if the complaint shows  
16 that plaintiff has personal knowledge of the matters stated and plaintiff calls to the court's  
17 attention those parts of the complaint upon which plaintiff relies. Plaintiff may serve and file one  
18 or more affidavits or declarations setting forth the facts that plaintiff believes prove plaintiff's  
19 claims; the person who signs an affidavit or declaration must have personal knowledge of the  
20 facts stated. Plaintiff may rely upon written records, but plaintiff must prove that the records are  
21 what plaintiff claims they are. Plaintiff may rely upon all or any part of the transcript of one or  
22 more depositions, answers to interrogatories, or admissions obtained in this proceeding. If  
23 plaintiff fails to contradict the defendants' evidence with counteraffidavits or other admissible  
24 evidence, the defendants' evidence may be taken as the truth and the defendants' motion for  
25 summary judgment granted. If there is some good reason why such facts are not available to  
26 plaintiff when required to oppose a motion for summary judgment, the court will consider a

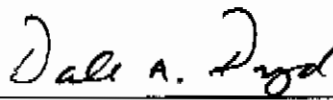
1 request to postpone considering the defendants' motion. If plaintiff does not serve and file a  
2 written opposition to the motion or a request to postpone consideration of the motion, the court  
3 may consider the failure to act as a waiver of opposition to the defendants' motion. If the  
4 defendants' motion for summary judgment, whether opposed or unopposed, is granted, judgment  
5 will be entered for the defendants without a trial and the case will be closed.

6 11. A motion or opposition supported by unsigned affidavits or declarations will  
7 be stricken.

8 12. Each party shall keep the court informed of a current address at all times  
9 while the action is pending. Any change of address must be reported promptly to the court in a  
10 separate document captioned for this case and entitled "Notice of Change of Address." A notice  
11 of change of address must be properly served on other parties. Pursuant to Local Rule 83-182(d),  
12 service of documents at the record address of a party is fully effective. Failure to inform the  
13 court of a change of address may result in the imposition of sanctions including dismissal of the  
14 action.

15 13. The failure of any party to comply with this order, the Federal Rules of Civil  
16 Procedure, or the Local Rules of Court may result in the imposition of sanctions including, but  
17 not limited to, dismissal of the action or entry of default. Fed. R. Civ. P. 11; Local Rule 11-110.

18 DATED: December 15, 2005.

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21 DALE A. DROZD  
22 UNITED STATES MAGISTRATE JUDGE

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